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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 74

INDEPENDENT BROADCASTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The decision of the Federal Communications Commission (R. 226-269) [1] has not been reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 279-281) is reported at 193 F. 2d 900. The order denying the petition for rehearing and amending the original opinion (R. 307) has not been reported.

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[1] In this brief, references to the printed record appear as R. ——, and references to the original administrative record appear as Tr. ——.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1951 (R. 282). A petition for rehearing filed on November 9, 1951 (R. 286-298), was denied on February 20, 1952 (R. 307). The petition for a writ of certiorari was filed on May 20, 1952. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Commission may, consistently with the First Amendment, deny an application for a radio station license where evidence as to the past pattern of behavior of the principal stockholder, in the form of speeches, writings, and other activities, supports findings from which the Commission could reasonably conclude that the applicant lacked the character and sense of responsibility necessary to operate a radio station in the public interest.

2. Whether the Commission upon first learning of causes or circumstances which would make the operation of the station against the public interest, after the grant of a construction permit, acted properly under Sections 319(b) and 309(a) of the Communications Act in passing on the qualifications of the parties involved in a hearing on its application for station license.

STATUTES INVOLVED

The pertinent sections of the Communications Act of 1934 are set out in the appendix to the petition for certiorari.

STATEMENT

On July 3, 1946, petitioner Independent Broadcasting Company applied to the Commission for a permit to construct a new standard AM broadcast station in Knoxville, Tennessee (R. 10). Section 319 of the Communications Act of 1934, as amended, provides that no station license may be granted for operation of any station unless a permit for the construction has been previously granted by the Commission. The construction permit was granted on October 10, 1946 (Tr. 111). On July 8, 1947, after completion of the construction, petitioner filed an application for station license (Tr. 308). Meanwhile, on December 16, 1946, petitioner had also filed an application for a permit to construct an FM station at Knoxville (R. 23).

Subsequent to the grant of the AM construction permit and prior to the filing of application for license on July 8, 1947, information came to the attention of the Commission, as the result of an investigation in connection with petitioner's FM application, which indicated that Independent, or its officers and stockholders, had engaged in misrepresentations and concealments in various applications, amendments and reports filed with the Commission and that the activities of J. Harold Smith, its president and principal stockholder, demonstrated his unfitness to control a broadcast licensee. On the basis of this information, the Commission on August 14, 1947 (R. 26), set for hearing, in a consolidated proceeding, the application for an AM station license and the application

for an FM construction permit. The hearing was held in Washington, D. C. from October 20 through October 24, 1947, and in Knoxville, Tennessee from November 17 through November 19, 1947. An Initial Decision, concluding that the applications should be denied, was issued on June 29, 1948 (Tr. 2174-2201). On August 13, 1948 petitioner filed exceptions (Tr. 2213) and oral argument was held on December 7, 1948 (Tr. 2285). On August 11, 1949 the Commission rendered its final decision denying both applications (R. 226-266).

On the basis of the evidence presented at the hearing, the Commission made findings of fact from which it concluded that petitioner had concealed or misrepresented facts of such materiality as to warrant denial of its applications. The Commission found that petitioner had misrepresented the true facts with respect to the distribution of a large percentage of both the common and preferred stock of the corporation. Smith, his wife, and a third stockholder each held 50 shares of common stock at the time of filing the application for a construction permit, and it was represented to the Commission that the third party would receive the remaining 50 shares. Instead, these remaining shares were split three ways with the result that Smith and his wife received a controlling interest. While it had been represented that the preferred stock would be sold on the open market, it was, in fact, all sold to Smith. The true financial status and the business and radio activities of Smith had also been misrepresented. There was no disclosure

of Smith's interest in the Southern Bible Institute, a newspaper called "Carolina Watchman," a program called the "Radio Bible Hour," nor in XERF, a Mexican radio station. The true amount of Smith's assets was misrepresented and his liabilities were listed as "none" when, in fact, he owed $123,000.

The Commission also made an independent determination that it was unable to conclude that Smith, petitioner's president and controlling stockholder, should be entrusted with the responsibilities of a licensee. This conclusion was based upon consideration of undisputed evidence concerning the intemperance of the language used by Smith in his writings and broadcasts, his constant habit of attacking the honesty and sincerity of those with whom he disagreed, his efforts to institute economic boycotts of people and groups who failed to give him the degree of cooperation which he demanded, and his solicitation of funds on the basis of statements of urgent need contrary to fact.

On appeal the Court of Appeals for the District of Columbia Circuit affirmed the decision of the Commission with respect to all points raised. Speaking for the court, Judge Miller stated that the Commission had made findings in considerable detail and that (R. 280):

> . . . the record fully justifies and solidly supports the findings. The evidence left no doubt as to misrepresentation and concealment of pertinent factual information. It contained information showing not only that Smith had

> been intemperate in his writings, sermons and broadcasts, but that he was an expert in vituperation and vilification.

Despite the fact that the petitioner had at no time raised before the Commission any question concerning the legality of the procedure followed by the Commission in ordering a hearing on petitioner's application for station license, the argument had been made before the Court of Appeals for the first time that the proper procedure should have been revocation of its construction permit pursuant to the provisions of Section 312(a) of the Act. The court rejected this argument (R. 281):

> The issuance of a construction permit does not guarantee a station license to the permittee, who is warned by § 319(b) of the statute that he will not be entitled to an operating license after completion of construction unless he has fully met all the terms, conditions and obligations of his application and permit, and unless it is made to appear to the Commission ". . . that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest . . ."

On February 20, 1952, the court denied a petition for rehearing (R. 307).

ARGUMENT

1. This case involves a decision of the Commission, made after a full hearing, denying an appli-

cant a standard broadcast station license and a permit to construct an FM station. These applications were denied because the Commission found the applicant did not possess the requisite character qualifications essential to a determination that the applicant could be entrusted with the public responsibility of a broadcast licensee. This conclusion was based upon two independent grounds, either of which fully warranted the denial of the applications. (R. 260.) The first of these, with which petitioner does not here take issue, was that the applicant had concealed or misrepresented facts in various applications and pleadings filed with the Commission and consequently was not qualified to be a licensee. The Commission is authorized to deny an application for a license where it finds that the applicant, in its dealings with the Commission, has made false statements or otherwise misrepresented facts to the Commission, or has failed to submit other information which it was under an obligation to provide. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223; *Federal Communications Commission* v. *Broadcasting Service Organization, Inc.*, 337 U.S. 901; *Mester* v. *United States*, 70 F. Supp. 118 (E.D. N.Y.), affirmed, 332 U. S. 749. The factual basis for this determination was reviewed by the Court of Appeals, and the evidence and the findings were found fully adequate to warrant the Commission's decision. The Commission's decision can rest on the above ground alone and it is, therefore, unnecessary to reach the other independent basis upon

which the Commission placed its decision. See *Alma Motor Co.* v. *Timken Co.*, 329 U.S. 129; cf. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62; *LeTulle* v. *Scofield*, 308 U.S. 415.

2. It is, in any event, clear that the Commission's alternative ground for denying petitioner's license application because the record of the activities of its president and controlling stockholder demonstrated his lack of qualifications to meet and bear the responsibilities of a broadcast licensee, does not raise any serious constitutional issues. The Commission's decision was not one denying Smith the use of broadcasting facilities for broadcasting any of his views nor denying Smith a license to own and operate radio facilities because of disagreement with his views. Rather, it denied petitioner a license to own and operate broadcast facilities because the record conclusively demonstrated that Smith's past conduct was of a nature strongly indicating to the Commission that a corporation dominated by him could not be entrusted to discharge important responsibilities of a broadcast licensee to operate in the public interest. As the Commission stated in its decision (R. 265):

> Our concern in this proceeding is not with the propriety of individual broadcasts containing the language which Smith has used and the attacks which he has made, but with Smith's qualifications as a broadcast licensee, in which role he will have the responsibility of determining the overall radio fare offered to the listeners in the service area of his station.

It is a basic principle of the Communications Act that the day-to-day determinations as to what individuals should be given access to the radio and what subjects or issues should be discussed must be made by the individual licensees in the exercise of their responsibilities to operate their stations in the public interest. Cf. *Simmons* v. *Federal Communications Commission,* 169 F. 2d 670 (C.A.D.C.), certiorari denied, 335 U.S. 846. Moreover, far from indicating that persons with the religious and other views of Smith should be excluded from the air, the Commission has always held that licensees should, as far as possible, present a balanced well-rounded program schedule including differing viewpoints on religious and social problems (see *In the Matter of Editorializing by Broadcast Licensees,* 1 (Part 2) Pike & Fischer, R.R. p. 91:201; *United Broadcasting Company (WHKC),* 10 F.C.C. 515; *Petition of Sam Morris,* 11 F.C.C. 197), and that stations may not justify a policy of excluding the expression of any significant point of view on religious or secular matters on grounds that its expression might prove unpopular with a segment or even a majority of the listening public. *Petition of Robert Harold Scott,* 11 F.C.C. 372.

Sections 308(b) and 319(a) of the Communications Act expressly provide that in determining the qualifications of a licensee to serve the public interest, the Commission should consider the

"character" of applicants to the extent it may bear on his ability to operate a station in the public interest. See *Mester* v. *United States*, 70 F. Supp. 118 (E.D.N.Y.), affirmed, 332 U.S. 749. And, "in determining whether a particular applicant should be permitted to operate so important and restricted a facility as a radio station, which reaches into the homes of so many people, it is appropriate that the Commission examine pertinent aspects of the past history of the applicant." *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28, 33 (C.A.D.C.). The test is an applicant's ability to serve the "public interest," and denial of an application on that ground, if valid under the Act, is not an abridgement of the rights guaranteed by the First Amendment. *National Broadcasting Company* v. *United States*, 319 U.S. 190, 227; see *Mansfield Journal Company* v. *Federal Communications Commission*, 180 F. 2d 28 (C.A.D.C.); *Johnston Broadcasting Company* v. *Federal Communications Commission*, 175 F. 2d 351 (C.A.D.C.); *Simmons* v. *Federal Communications Commission*, 169 F. 2d 670 (C.A.D.C.), certiorari denied, 335 U.S. 846; *Bay State Beacon, Inc.* v. *Federal Communications Commission*, 171 F. 2d 826 (C.A.D.C.); cf. *Trinity Methodist Church, South* v. *Federal Radio Commission*, 62 F. 2d 850 (C.A.D.C.), certiorari denied, 284 U.S. 685, and *KFKB Broadcasting Association* v. *Federal Radio Commission*, 47 F. 2d 670 (C.A.D.C.).

3. Petitioner's contention that the Commission

acted improperly in passing upon its application for a station license pursuant to the provisions of Sections 309 and 319(b) of the Communications Act rather than proceeding by way of revocation of its outstanding construction permit, in accordance with the provisions of Section 312(a) of the Act, clearly presents no substantial question.

In accordance with Section 319(b) the Commission, where the holder of a construction permit has completed construction and desires to secure a station license for regular operation, requires the permittee to file an application for such a license. And where it appears either that the terms, conditions or obligations set forth in the original application for a permit or the permit itself have not been met or, as here, that circumstances which have first come to the Commission's attention since the grant of the permit would make operation of the station against the public interest, the application for station license is designated for hearing in conformity with the provisions of Section 309(a) of the Communications Act. This section provides:

> If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such

> application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Petitioner made no objection to following this established procedure throughout the entire course of proceedings before the Commission. It contended in the Court of Appeals, for the first time, that the proper procedure in this case was to be found in Section 312(a) of the Act, relating to "Revocation of Licenses." Its argument, in brief, is that when the Commission discovered, after the construction permit had been granted and construction of the station completed, that the permittee had made misstatements of fact to the Commission and had otherwise demonstrated that its operation of a station would be contrary to the public interest, the Commission's sole remedy was to revoke the construction permit rather than to hold a hearing in the prescribed manner on the station license application. The Court of Appeals properly rejected this argument, holding that Section 312(a) has "no direct application to this case; this is not a revocation proceeding of any sort, but a proceeding on an application for a station license." (R. 281.)

Nor is there any merit in petitioner's contention that confirmation of the statutory procedure followed in the instant case would result in the crea-

tion of a period in which the holder of a construction permit who has applied for a station license is neither a permittee nor licensee and consequently reverts to the same status and rights of an original applicant who has not yet secured a construction permit. Neither the Court of Appeals nor the Commission has suggested that petitioner ceased to be a permittee either when it completed construction or filed its application for a station license; obviously it continued to be the holder of a valid permit until the Commission completed its determination of its license application. And as such its license application was required to be considered according to the express standards of Section 319 (b); the Commission was, in other words, directed to issue the station license unless the permittee had failed to construct in conformity with its application or permit or unless, as here, causes or circumstances coming to the attention of the Commission for the first time since the grant of the permit demonstrated that operation of the station would not be in the public interest. Contrary to petitioner's claim, there is absolutely no question involved here of permittees applying for station licenses being considered (Pet. 19) "as new applicants without any procedural rights."

CONCLUSION

The decision below is correct and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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